

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL WRIT PETITION NO.1333 OF 2004**

Suresh Sham Singh,
aged 35 years, Indian
Inhabitant, residing at
Simplex Building, 2nd
Floor, Room No.C 110,
Pawalla Street,
Mumbai-400 004.

.... Petitioner

- Versus -

1. Shri A.N. Roy,
Commissioner of Police,
Brihan Mumbai.
2. The Sr. Inspector of Police,
Dr. D.B. Marg Police Station. Respondents

Ms Anjali Patil for the Petitioner.

Shri D.S. Mhaispurkar, Addl. Public Prosecutor,
for the Respondents.

WITH

CRIMINAL WRIT PETITION NO.1334 OF 2004

Malika Khan
aged 35 years, Indian
Inhabitant, residing at
Simplex Building, 2nd
Floor, Room No.C/25,
Mumbai-400 004.

.... Petitioner

- Versus -

1. Shri A.N. Roy,
Commissioner of Police,
Brihan Mumbai.
2. The Sr. Inspector of Police,
Dr. D.B. Marg Police Station.
3. State of Maharashtra Respondents

Ms Anjali Patil for the Petitioner.

Shri D.S. Mhaispurkar, Addl. Public Prosecutor,
for the Respondents.

CRIMINAL WRIT PETITION NO.1335 OF 2004

A.A.R. Malik,
aged 35 years, Indian
Inhabitant, residing at
Simplex Building, 2nd
Floor, Room No.C/11,
Mumbai-400 004. Petitioner

- Versus -

1. Shri A.N. Roy,
Commissioner of Police,
Brihan Mumbai.
2. The Sr. Inspector of Police,
Dr. D.B. Marg Police Station. Respondents

Ms Anjali Patil for the Petitioner.

Shri D.S. Mhaispurkar, Addl. Public Prosecutor,
for the Respondents.

CRIMINAL WRIT PETITION NO.1344 OF 2004

Smt. Rajanigandha alias Rita
Singh, an Indian Inhabitant
of Mumbai, aged about 45 years,
occupation housewife, residing
at Flat No.103, 1st floor,
Mulitola Building, Opp:
McDonald's Restaurant,
Linking Road, Khar (W),
Mumbai-400 052. Petitioner

- Versus -

1. State of Maharashtra
2. Commissioner of Police,
Greater Bombay, Police
Headquarters, Crawford
Market, Mumbai-400 002. Respondents

Shri A.R. Pande for the Petitioner.

Shri D.S. Mhaispurkar, Addl. Public Prosecutor,
for the Respondents.

CRIMINAL WRIT PETITION NO.1350 OF 2004

A. Nayak,
aged 60 years, Indian
Inhabitant, residing at
Simplex Bldg., 3rd
Floor, R.No.D/9,
Mumbai-400 004. Petitioner

- Versus -

1. The State of Maharashtra
2. Shri A.N. Roy,
Commissioner of Police,
Brihan Mumbai.
3. The Sr. P.I.,
Dr. D.B. Marg P.Stn. Respondents

Ms Anjali Patil for the Petitioner.

Shri Bharat Mehta, Addl. Public Prosecutor,
for the Respondents.

CRIMINAL WRIT PETITION NO.1619 OF 2004

1. Smt. Raji Swamy Shetty,
aged 40 years
 2. Smt. Latarani Babu Nadawala,
aged 35 years
- Both House Hold ladies Hindu
Adult Indian Inhabitant of Mumbai
residing at Room No.C/1, Simplex
Building, 2nd Floor, Pavwala
Road, Mumbai-400 004. Petitioners

- Versus -

1. The State of Maharashtra

2. Commissioner of Police,
Gr. Bombay,
District Magistrate appointed
under PITA, Opp: M.G. Phule
Market, Fort, Mumbai-400 001.
3. Sr. Inspector of Police,
D.B. Marg Police,
Mumbai-400 007. Respondents

Shri O.R. Tiwari for the Petitioners.

Shri Bharat Mehta, Addl. Public Prosecutor,
for the Respondents.

CRIMINAL WRIT PETITION NO.1638 OF 2004

Nagi Gaurangi Gauda,
an Indian Inhabitant of
Mumbai, aged about 40 years,
residing at Damodar Building,
Room No.3, 1st Floor,
Navalkar Lane,
Mumbai-400 004. Petitioner

- Versus -

1. State of Maharashtra
2. Commissioner of Police,
Greater Bombay, Police
Headquarters, Crawford
Market, Mumbai-400 002. Respondents

Shri A.R. Pande for the Petitioner.

Shri Bharat Mehta, Addl. Public Prosecutor,
for the Respondents.

CRIMINAL WRIT PETITION NO.1716 OF 2004

Sessappa M. Pujary
an Indian Adult, residing
at Kembuda Palke House,
Shirtady Village,
Mangalore Tq.
Age: 45 years. Petitioner

- Versus -

1. State of Maharashtra
2. Commissioner of Police,
Greater Bombay,
Police Headquarters,
Crawford Market,
Mumbai-400 002. Respondents

Shri A.S. Jondhale for the Petitioner.

Shri D.S. Mhaispurkar, Addl. Public Prosecutor,
for the Respondents.

CRIMINAL WRIT PETITION NO.1800 OF 2004

Smt. Reshma Ravindra Dolas,
Adult, Indian Inhabitant, aged
about 42 years, having her
address of residence at
Adarsh Nagar Tenements, Room
No.1076, New Link Road,
Behind Mastakar Petrol Pump,
Oshiwara, Mumbai-400 102. Petitioner

- Versus -

1. State of Maharashtra
2. A.N. Roy,
Commissioner of Police,
City of Mumbai. Respondents

Sarvasri S. Shrimani with M.G. Gawde for
the Petitioner.

Shri Bharat Mehta, Addl. Public Prosecutor,
for the Respondents.

CRIMINAL WRIT PETITION NO.2681 OF 2004

Smt. Bhagirathi V. Shetty,
Aged 67 years, Indian Inhabitant,
residing at Room No.C/6, 2nd
Floor, Simplex Building,
Pawwala Street, Grant Road,

Mumbai-400 004. Petitioner

- Versus -

1. Shri A.N. Roy,
Commissioner of Police,
Greater Mumbai,
Opp: Crawford Market,
Mumbai-400 001.
2. The Senior Inspector of
Police, D.B. Marg Police
Station, Mumbai-400 007.
3. State of Maharashtra Respondents

Shri B.A. D'Lima i/b M/s. D'Lima &
Associates for the Petitioner.

Shri Bharat Mehta, Addl. Public Prosecutor,
for the Respondents.

CRIMINAL WRIT PETITION NO.2682 OF 2004

1. Baby Bangera,
Aged 55 years, Indian
Inhabitant residing at Jamna
Mansion, 2nd Floor, Room
No.B/16, Khetwadi, 14th
Lane, Khetwadi,
Mumbai-400 004.
2. Sunita N. Pujari,
Aged 50 years, Indian
Inhabitant residing at Jamna
Mansion, 2nd Floor, Room
No.B/16, Khetwadi, 14th
Lane, Khetwadi,
Mumbai-400 004. Petitioners

- Versus -

1. Shri A.N. Roy,
Commissioner of Police,
Greater Mumbai,
Opp: Crawford Market,
Mumbai-400 001.
2. The Senior Inspector of
Police, D.B. Marg Police
Station, Mumbai-400 007.

3. State of Maharashtra Respondents

Shri B.A. D'Lima i/b M/s. D'Lima &
Associates for the Petitioners.

Shri Bharat Mehta, Addl. Public Prosecutor,
for the Respondents.

CRIMINAL WRIT PETITION NO.2683 OF 2004

1. Ganga M. Pujari @ Nayak
Aged 50 years, Indian
Inhabitant residing at Jamna
Mansion, 3rd Floor, Room
No.A/20, Khetwadi, 14th
Lane, Khetwadi,
Mumbai-400 004.

2. R.D. Kamble nee Pujari,
Aged 35 years, Indian
Inhabitant residing at Jamna
Mansion, 3rd Floor, Room
No.A/20, Khetwadi, 14th
Lane, Khetwadi,
Mumbai-400 004.

. . . . Petitioners

- Versus -

1. Shri A.N. Roy,
Commissioner of Police,
Greater Mumbai,
Opp: Crawford Market,
Mumbai-400 001.

2. The Senior Inspector of
Police, D.B. Marg Police
Station, Mumbai-400 007.

3. State of Maharashtra Respondents

Shri B.A. D'Lima i/b M/s. D'Lima &
Associates for the Petitioners.

Shri Bharat Mehta, Addl. Public Prosecutor,
for the Respondents.

AND

CRIMINAL WRIT PETITION NO.2685 OF 2004

Ammani Gopal Poojari
Adult, 40 years,
R.No.B/9, Khetwadi 14th
Lane, Jamna Mension Bulding,
Grant Road (E),
Mumbai-400 004.

.... Petitioner

- Versus -

1. The State of Maharashtra
2. Shri A.N. Roy,
Commissioner of Police,
Greater Bombay.
3. Sr. Inspector of Police
(D.B.Marg Police Station) Respondents

Shri Sandeep C. Kekane for the Petitioner.

Shri Bharat Mehta, Addl. Public Prosecutor,
for the Respondents.

CORAM: R.M.S. KHANDEPARKAR &
P.V. KAKADE, JJ.

DATED: MAY 06, 2005

JUDGMENT (Per R.M.S.Khandeparkar, J.):

1. In all these petitions, common questions of law and facts arise and therefore they were heard together and are being disposed of by this common judgment. Upon hearing at length the learned Advocates for the parties, rule in all the petitions and by consent, the rule is made returnable forthwith.

2. Though the orders issued under Section 18 of the

Immoral Traffic (Prevention) Act, 1956, hereinafter called as "the said Act" are sought to be challenged on various grounds, it is not necessary to refer to all those grounds and suffice to refer to only one ground which relates to absence of power to the Commissioner of Police to issue orders under Section 18 of the said Act in the capacity as the District Magistrate.

3. In all these petitions, notices have been issued under Section 18 of the said Act either for eviction of the occupiers or for imposing conditions for letting out the premises wherein the brothel was alleged to have been run and all those notices have been, admittedly, issued by the Police Commissioner of Mumbai purportedly in exercise of powers of the District Magistrate under the said Act r/w the provisions of Section 20 of the Code of Criminal Procedure, 1973, hereinafter called as "the Code". The contention of the petitioners is that though the Police Commissioner can be conferred with the powers of the Executive Magistrate in terms of the provisions of Section 20(5) of the Code, he cannot either be appointed as the District Magistrate or conferred with the powers of the District Magistrate and therefore he cannot act as or perform the functions of the District Magistrate under the said Act. Therefore, according to the learned Advocate for the petitioners, the notices issued by the Police Commissioner in

purported exercise of the powers of the District Magistrate under the said Act are without jurisdiction and therefore bad in law and cannot be enforced and therefore needs to be quashed and set aside. In other words, the contention of the petitioners is that the Police Commissioner in the purported exercise of the powers of the District Magistrate can neither issue any show cause notice nor can pass any order under Section 18 of the said Act.

4. On the other hand, it is the case of the respondents that the Police Commissioner has been duly conferred with the powers of the District Magistrate as being within the metropolitan area of Brihanmumbai for the purpose of exercising the functions under Section 18 of the said Act and Section 20 of the Code and such powers have been conferred in terms of Section 20(1) and (2) r/w sub-section (5) of the Code vide the Notification dated 1st October, 99. According to the learned A.P.P., no fault can be found with the impugned orders on the alleged ground of absence of jurisdiction to the Commissioner of Police to exercise the powers of the District Magistrate under the said Act. Reliance is sought to be placed in that regard in the decision of the Apex Court in the matter of **State of Maharashtra and others v. Mohammed Salim Khan and others**, reported in 1991 SCC (Cri.) 253.

5. The Section 18 of the said Act empowers a Magistrate to order eviction of all the occupiers of a premises used as a brothel or for carrying on prostitution and further to impose conditions of requirement of prior approval of the Magistrate in case the owner desires to let out the premises after the premises having been found to have been used as a brothel or for carrying on prostitution. The term "Magistrate" has been defined in Section 2(c) of the said Act to mean a Magistrate specified in the second column of the Schedule as being competent to exercise the powers conferred by the section in which the expression occurs and which is specified in the first column of the Schedule. The Schedule to the said Act discloses that in relation to Section 18 of the said Act, a Magistrate who is competent to exercise the powers is either the District Magistrate or the Sub-Divisional Magistrate.

6. The Chapter II of the Code relates to constitution of criminal Courts and offices in every State in India. The Section 6 thereof enumerates the classes of criminal Courts and under Clause (iv), it enlists the Court of the Executive Magistrate. The Section 20 thereof deals with the powers of the State Government to appoint Executive Magistrates and District Magistrate. It reads thus:-

"(1) In every district and in every metropolitan area, the State Government may appoint as many person as it thinks fit to be Executive Magistrates and shall appoint one of them to be the District Magistrate.

(2) The State Government may appoint any Executive Magistrate to be an Additional District Magistrate, and such Magistrate shall have such of the powers of a District Magistrate under this Code or under any other law for the time being in force as may be directed by the State Government.

(3) Whenever, in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the executive administration of the district, such officer shall, pending the orders of the State Government, exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate.

(4) The State Government may place an Executive Magistrate in charge of a sub-division and may relieve him of the charge as occasion requires; and the Magistrate so placed in charge of a sub-division shall be called the Sub-Divisional Magistrate.

(5) Nothing in this section shall preclude the State Government from conferring, under any law for the time being in force, on a Commissioner of Police, all or any of the powers of an Executive Magistrate in relation to a metropolitan area."

7. As already stated above, Section 18 of the said Act r/w Section 2(c) and the Schedule to the said Act would reveal that the powers under Section 18 are essentially to be exercised either by the District Magistrate or the Sub-Divisional Magistrate. It is pertinent to note that the said Act nowhere speaks of creation of office of the District Magistrate or the Sub-Divisional Magistrate under the said Act. Obviously, therefore, reference to the office of the District Magistrate under the said Act is to the District Magistrate appointed under the Code.

8. The Section 20 of the Code evidently discloses that the State Government is empowered to appoint any person as it deems fit to be the Executive Magistrate. The State Government is further empowered under sub-section (1) itself to appoint any one of the Executive Magistrates so appointed in exercise of the powers under sub-Section (1) of Section 20 to be the District Magistrate. The State Government is also empowered to appoint any of the Executive Magistrate to be the Additional District Magistrate and the Magistrate so appointed is empowered to have such powers of the District Magistrate under the Code or under any other law as may be directed by the State Government. The sub-section (2) is very clear in that regard. Three conclusions follow from sub-section (1) and sub-section (2) of Section 20 of the Code and they are (i) the Government may appoint any one person as it deems fit to be the Executive Magistrate; (ii) any one of the Executive Magistrates can be appointed as a District Magistrate and any other Executive Magistrate to be the Additional District Magistrate, and (iii) the Additional District Magistrate can exercise the powers of the District Magistrate to the extent he is conferred with those powers by the State Government. It is therefore evident that merely because an Executive Magistrate is appointed as an Additional District Magistrate, he does

not acquire the powers of the District Magistrate. On the contrary, his powers are restricted to the extent they are conferred upon him by the Government. He cannot by virtue of his office as an Additional District Magistrate assume the powers of the District Magistrate.

9. Under the sub-section (5) of Section 20 of the Code, the State Government is empowered to confer upon the Commissioner of Police in a metropolitan area all or any of the powers of an Executive Magistrate. Plain reading of sub-section (5) of Section 20 of the Code, therefore, would reveal that as far as the Police Commissioner in the metropolitan area is concerned, the Government is undoubtedly empowered to confer upon him all or any of the powers of an Executive Magistrate. It is pertinent to note that while sub-section (1) of Section 20 speaks of the Government's powers to appoint any person of its choice to be an Executive Magistrate, under the sub-section (5) thereof the Government is empowered merely to confer the powers of an Executive Magistrate upon the Commissioner of Police when it relates to a metropolitan area. In other words, the sub-section (5) would come into play or would be applicable only to metropolitan areas. In such areas the Government would be entitled to confer upon the Commissioner of Police all or any of the powers of an Executive Magistrate. But the provisions of law comprised under Section 20

nowhere speaks of appointment of a Commissioner of Police either in the metropolitan area or otherwise to be an Executive Magistrate.

10. The contention on behalf of the respondents is that the sub-section (1) itself gives wide powers to the Government to appoint any person as an Executive Magistrate and therefore even the Commissioner of Police can be appointed as the Executive Magistrate while sub-section (5) would relate only to metropolitan areas wherein it is specifically stated that the Government can confer the powers of an Executive Magistrate upon the Commissioner of Police, but that would not put an embargo on the powers of the Government to appoint a Commissioner of Police as an Executive Magistrate by taking recourse to sub-section (1) of Section 20 of the Code. It is difficult to accept this contention.

11. Very fact that in case of Commissioner of Police and that too restricted in the metropolitan area, a specific provision has been made in sub-section (5) inspite of a general provision being there in sub-section (1) empowering the State Government to appoint any person as an Executive Magistrate, that itself discloses the intention of the Legislature to classify the Commissioner of Police to be different from the person who can be appointed as an Executive

Magistrate in exercise of the powers under sub-section (1). Otherwise, there was absolutely no need of incorporating a specific provision under sub-section (5) in relation to Commissioner of Police. Otherwise, even in the absence of sub-section (5) a Commissioner of Police could have been appointed as an Executive Magistrate. The Legislature in its wisdom, however, has excluded the office of the Commissioner of Police under sub-section (1) while reserving the power to the State Government to confer the powers of an Executive Magistrate upon the Commissioner of Police in relation to a metropolitan area. In other words, it discloses that in case of the office of the Commissioner of Police only all or any of the powers of an Executive Magistrate can be conferred upon him and that too in relation to a metropolitan area but the Commissioner of Police cannot be appointed as an Executive Magistrate. The appointment of a person in an office is different from the conferment of powers attached to an office upon the person. In fact the decision sought to be relied upon by the learned A.P.P., rather than assisting the contention on the part of the respondents, justifies the view that we are taking in the matter.

12. In **Mohammed Salim Khan's** case (supra), this Court while considering Section 21 of the Code had held that a Special Executive Magistrate is not entitled to exercise

the powers of an Executive Magistrate and cannot also be conferred with the powers of an Executive Magistrate under Section 107 of the Code. When the matter was carried in the appeal, while analysing Section 21, the Apex Court held that the said Section can be conveniently divided into two parts. The first part relates to the power of the State Government to appoint for such term as it may think fit Executive Magistrates to be known as Special Executive Magistrates for particular areas for the performance of particular function. The second part relates to the power of the State Government to confer on the Special Executive Magistrate such powers as are conferable under the Code on the Executive Magistrate as it may deem fit. Thus while the first part provides for powers to the State Government to appoint an Executive Magistrate to be known as Special Executive Magistrate on such terms as it deems fit, the second part speaks of the nature of the power to be conferred on the Special Executive Magistrate. Further, the Apex Court ruled that:-

"A careful analysis of the section indicates very clearly that the Special Executive Magistrates are also Executive Magistrates. Under Part I of the section, the State appoints Executive Magistrates to be known as Special

Executive Magistrates. Since they are appointed as Executive Magistrates, they are entitled to exercise the powers conferred by the Code much the same way as other Executive Magistrates. But the power to appoint under Part I of Section 21 is not dependent upon or coupled with the power to be conferred under Part II of the section. **The appointment of Special Executive Magistrate is one thing and conferment of power on them is another. Each is independent of the other."**

(emphasis supplied)

Once it is apparent that the appointment of a person in the office is different from conferment of the powers of the said office, the distinction between the powers of the State Government under sub-section (1) and those under the sub-section (5) of Section 20 becomes crystal clear. While the sub-section (1) speaks of appointment of a person as an Executive Magistrate, the sub-section (5) speaks of conferment of powers of the office of Executive Magistrate. These are apparently two different things and the decision in Mohammed Salim Khan's case clearly lends support to this view.

13. The discussion on the point in issue will be incomplete without reference to two earlier decisions of the Apex Court, one in the matter of **Ajaib Singh v. Gurbachan Singh and others**, reported in AIR 1965 SC 1619 and another in **Hari Chand Aggarwal v. The Batala Engineering Co. Ltd. and others**, reported in AIR 1969 SC 483.

14. In **Ajaib Singh's** case (supra), the Apex Court while dealing with the question as to whether the powers of the District Magistrate under a statute can be exercised by an Additional District Magistrate or any other Magistrate below the rank of the District Magistrate, and specifically referring to Section 10 of the Criminal Procedure Code, 1898, hereinafter called as "the Old Code" and which section corresponds to Section 20 of the Code, held that:-

"even if an Additional District Magistrate has been appointed with all the powers under the Code and also under any other law for the time being in force, he is still not the District Magistrate unless the Government appoints him as such under Section 10(1) of the Code. even if an officer

is exercising the powers of the District Magistrate on there being a vacancy in the office of the District Magistrate he is still not the District Magistrate until he is appointed as such under S.10(1) of the Code."

Further dealing with the question as to whether an Additional District Magistrate can be said to be of the same rank as the District Magistrate, the Apex Court held that:-

"S.10(2) of the Code which shows that an Additional District Magistrate need not necessarily be conferred with all the powers of the District Magistrate under the Code or any other law for the time being in force. He can be an Additional District Magistrate though he may be exercising only some of the powers of the District Magistrate. Clearly, therefore, an Additional District Magistrate must be an officer below the rank of the District Magistrate. Further sub-s. (3) of S.10 bears this out. That sub-section says that for certain purposes, the Additional

District Magistrate shall be deemed to be subordinate to the District Magistrate. Therefore, even if the Additional District Magistrate is invested with all the powers of a District Magistrate under the Code or under any other law for the time being in force he is still below the District Magistrate for certain purposes mentioned in S.10(3) of the Code. Besides there is only one District Magistrate in a district and all other Magistrates whether they be Magistrates first class or even Additional District Magistrates must obviously be below him in rank."

(emphasis supplied)

15. In **Hari Chand Aggarwal's** case (supra), while dealing with the issue as to whether an Additional District Magistrate, Gurdaspur who had been invested with all the powers of the District Magistrate under Section 10(2) of the Old Code could make an order under Section 29(1) of the Defence of India Act, 1962 requisitioning a shop belonging to Batala Engineering Co. Ltd., the Apex Court held that:-

"The scheme of Section 10 of the Code leaves no room for doubt that the District Magistrate and the Additional District Magistrate are two different and distinct authorities and even though the latter may be empowered under sub-section (2) to exercise all or any of the powers of a District Magistrate but by no stretch of reasoning can an Additional District Magistrate be called the District Magistrate which are the words employed in sub-section (1) of Section 10."

The Apex Court further while approving the view taken by the Nagpur High Court in **Prabhulal Ram Lal Kabra v. Emperor**, reported in AIR 1944 Nagpur 84 held that the Additional District Magistrate who is invested with the powers of a District Magistrate does not thereby attain the status of a District Magistrate as there can be only one person in the district who can be a District Magistrate. The provisions of law comprised under Section 20 of the Code read with the above referred decisions of the Apex Court leaves no room for doubt that the office of the Executive Magistrate is different from that of the District Magistrate and a person cannot be appointed as a District Magistrate or an Additional

District Magistrate unless he is primarily appointed as an Executive Magistrate. The question of ranking somebody as a District Magistrate can arise only when such person is already appointed as the Executive Magistrate and not otherwise. So also, though wide powers are given to the Government to appoint as many persons as it thinks fit to be Executive Magistrates, and any one of them to be a District Magistrate, as far as the Commissioner of Police is concerned, he can be merely conferred with the powers of an Executive Magistrate in relation to a metropolitan area but he is not to be appointed as an Executive Magistrate. The office of the Executive Magistrate is different from the office having powers of an Executive Magistrate on account of conferment of such powers.

16. In the case in hand, the respondents claim that the Commissioner of Police has been appointed as the District Magistrate in exercise of the powers under sub-sections (1), (2) and (5) of Section 20 of the Code by the Notification dated 1st October, 1999. The said Notification reads thus:-

"In exercise of the powers conferred by sub-section (5) read with sub-sections (1) and (2) of section 20 of the Code of Criminal Procedure 1973 (2 of 1974), and

of all other powers enabling it in that behalf, the Government of Maharashtra hereby confers on the Commissioner of Police, Brihan Mumbai, for the purposes of sections 18 and 20 of the Immoral Traffic (Prevention) Act, 1956 (104 of 1956)."

17. Plain reading of the said Notification discloses that undoubtedly the Government was seeking to exercise the powers under sub-section (5) r/w sub-sections (1) and (2) of Section 20 of the Code to confer upon the Commissioner of Police the powers of the District Magistrate within the metropolitan area of Brihanmumbai for the purpose of Section 18 of the said Act. However, as already seen above, the provisions of law comprised under Section 20 of the Code nowhere speak of the Government being empowered to confer the powers of the District Magistrate upon the Police Commissioner either in any metropolitan area or otherwise. On the contrary, sub-section (1) specifically restricts the appointment of District Magistrate from amongst the Executive Magistrates. The sub-section (2) relates to the appointment of an Additional District Magistrate and that too any one of the Executive Magistrates and the sub-section (5) merely speaks of conferment of powers of an Executive Magistrate. The Notification nowhere

discloses either conferment of the powers of the Executive Magistrate or even the appointment of the Police Commissioner as the Executive Magistrate. As already stated, there cannot be appointment District Magistrate unless the person is primarily an Executive Magistrate. It is settled law that when the statute defines the limits of the power that can be conferred upon a specific officer, the conferment of power has to be within the parameters prescribed under the statute.

18. Once it is apparent that the Commissioner of Police was not appointed as an Executive Magistrate nor he had been appointed as the District Magistrate, question of he exercising the power of the District Magistrate by Commissioner of Police does not arise at all. Merely on the strength of the Notification which ex facie discloses to be contrary to or in excess of the powers of the State Government, certainly the person who claims to have acquired the right under such Notification would not be entitled to exercise the statutory powers which are essentially to be exercised by the person who has been lawfully delegated with the power to exercise those statutory powers. When a statute prescribe limits to the extent to which the power can be delegated, any delegation of the power beyond the statutory provision in that regard would be illegal and unenforceable. It is well-settled that when a statute prescribes the

power, it must be exercised by that body or officer and none else, unless the statute by express words or necessary implication permits delegation, in which event, it may also be exercised by the delegate if the delegation is made in accordance with the terms of the statute and not otherwise {vide: **The Marathwada University v. Seshrao Balwant Rao Chavan** (AIR 1989 SC 1582)}. A Notification issued in excess of powers would be illegal and unlawful ab initio and therefore unenforceable and therefore any act performed on the strength of such unenforceable delegation of power would be ab initio bad in law.

19. The learned A.P.P., however, referring to Section 5 of the Code has sought to contend that the appointment being for the purpose of exercise of powers under Section 18 of the said Act, the Notification cannot be held to be unenforceable. The Section 5 of the Code provides that "Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force." As already seen above, none of the provisions of the said Act empowers the creation of the post of District Magistrate nor of appointment of any person in such post. The power to

appoint a person as a District Magistrate vest in the State Government by virtue of Section 20 of the Code. Therefore, the authority to act as a District Magistrate under the said Act has essentially to be a District Magistrate appointed under the Code and in that regard Section 5 will be of no help to the respondents to contend that the appointment under the Notification dated 1st October, 99 of the Commissioner of Police as the District Magistrate would empower him to function as the District Magistrate for the purpose of Section 18 of the said Act. Unless he is a District Magistrate appointed under Section 20, question of he exercising the powers of the District Magistrate under Section 18 of the said Act does not arise.

20. It is always to be remembered that the power to appoint and the manner of exercise of such powers are two different things. When the power to do a thing exists, and even the mode for exercise of such power is prescribed, undoubtedly, it is expected that the prescribed mode should be followed for exercise of the power. However, variation in the manner of exercise of power adopted by the authority would not render the act or the exercise of power itself to be ab initio void. Such an act or exercise of power would undoubtedly be voidable and can be subjected to judicial review resulting in declaration of the exercise of the power to

be illegal and therefore the act being set aside. However, in cases where the authority seeks to do a thing or act on the assumption that it is empowered to act or to do a thing, when in law no such power exists to that authority to do the act or a thing, then such an act or thing done would be ab initio void and bad in law. A voidable act would require the necessary proceedings to get it set aside whereas an act which is void ab initio will be bad in law for all purposes and being a nullity it would remain unenforceable and any act done pursuant to such nullity would be also be bad in law ab initio.

21. The Apex Court in **Ittyavira Mathai v. Varkey Varkey**, reported in AIR 1964 SC 907, held that when the provisions of law merely lay down the manner in which the jurisdiction has to be exercised, that the non-compliance thereof would only make the order voidable which would be liable to be set aside but till then it would be operative and cannot be ignored or collaterally attacked; however, when there is a condition precedent for the assumption of jurisdiction, then non-compliance thereof would render the order to be void.

22. Their Lordships of the Privy Council in **Jang Bahadur v. Bank of Upper India Ltd.**, reported in AIR

1928 PC 162, while distinguishing the matter relating to jurisdiction from the one of the procedure relating to exercise thereof had held that if there is non-compliance of the prescribed procedure for exercise of jurisdiction, the defect might be waived, and the party who had acquiesced in the Court exercising it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings. The Nagpur High Court in **Devidas v. Nilkanthrao**, reported in AIR 1936 Nagpur 157 while following the said decision of the Privy Council had pointed out the difference between the jurisdiction from that of exercise thereof stating that the error of judgment would be reversible by the Appellate Court and therefore voidable, whereas the usurpation of power would be a total nullity.

23. The Full Bench of the Kerala High Court in **Madhavan Pillai Somanatha Pillai and another v. State of Kerala and others**, reported in AIR 1966 Kerala 212 while dealing with differentiation between the concept of void from that of voidable held that:-

"A thing that is void in the strict sense of the word is a mere nullity and may be ignored even in collateral proceedings as if it never were. "Void ab initio" is the expression courts

often use to make it clear that they mean "void" in the strict sense of the word."

24. Similarly, the Calcutta High Court in **Suresh Chandra Bose v. The State of West Bengal**, reported in AIR 1976 Calcutta 110 had aptly described the effect of an act done without authority by saying that "A thing which is void is non-est and it is not necessary to set that aside though it is sometimes convenient to do so."

25. The fall out of the above discussion is that:-

- (i) The District Magistrate or the Additional District Magistrate can be appointed out of the Executive Magistrates so appointed under Section 20(1) of the Code.
- (ii) The Additional District Magistrate can exercise the powers of the District Magistrate to the extent directed by the State Government.
- (iii) Unless a person is appointed as an Executive Magistrate, he can neither be appointed as a District Magistrate nor an Additional District Magistrate.

- (iv) In relation to a metropolitan area the powers of an Executive Magistrate can be conferred upon the Commissioner of Police.
- (v) The State Government's power to appoint any person as an Executive Magistrate in terms of the provisions of law under sub-section (1) of Section 20 of the Code does not include the power to appoint the Commissioner of Police as an Executive Magistrate.
- (vi) As far as the Commissioner of Police is concerned, he can only be conferred with the powers of the Executive Magistrate in terms of sub-section (5) of Section 20 of the Code but is not entitled to be appointed even as an Executive Magistrate under sub-section (1) of Section 20 of the Code.
- (vii) The District Magistrate, Additional District Magistrate and the Executive Magistrate are three different offices.

26. Considering the facts of the case in hand and as the Notification sought to be relied upon by the respondents being clearly beyond the scope of the powers under Section 20 of the Code, same is bad in law ab

initio and does not empower the Police Commissioner, Mumbai to assume the jurisdiction of the District Magistrate under the said Act. Hence, the orders issued by the Commissioner of Police, Mumbai under the purported exercise of the powers of the District Magistrate under the said Act by virtue of the said Notification are to be held as ab initio bad in law and therefore need to be quashed and set aside.

27. In the result, all the writ petitions succeed. The impugned orders are hereby quashed and set aside and the respondents are directed to remove the seals on the doors of the premises in question and to restore the possession of the premises to the respective petitioners forthwith. The rule is made absolute in all the petitions in above terms with no order as to costs.

(R.M.S. Khandeparkar, J.)

(P.V. Kakade, J.)